(1) Supreme Court, U.S.
FILED
OCT 25 2002
OFFICE OF THE CLERK

NO. 02 656

In The

Supreme Court of the United States

BRENDA FRANKLIN AND ROBERT FRANKLIN,
Petitioners,

vs.

FREDDIE CHAPMAN,
Respondent,

Petition for a Writ of Certiorari

JOHN MICHAEL BROWN
Counsel of Record
Attorney for Petitioners
2321 Central Avenue
Augusta, Georgia 30904
(706) 731-9925

QUESTION PRESENTED

The Eleventh Circuit extends qualified immunity to an officer if he has "arguable probable cause" to search or arrest, without regard to whether authority exists that would give notice that the arrest or search was constitutionally impermissible. By focusing on the perceptions of the officer involved, does the "arguable probable cause" standard impermissibly shift the analysis of qualified immunity away from the objective standard of a well-trained officer?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed

TABLE OF CONTENTS

Page

Questions Presented I

List of Parties ii

Table of Contents iii

Table of Citations iv

Positive Laws Involved 1

Statement of Jurisdiction 1

Statement of the Case 2

Reasons for Granting the Writ 4

I. A CONFLICT EXISTS AMONG THE COURTS OF APPEALS AS TO WHETHER THE TEST OF QUALIFIED IMMUNITY DEPENDS UPON THE SUBJECTIVE SPECULATIONS OF THE PARTICULAR OFFICER OR THE OBJECTIVE KNOWLEDGE IMPUTED TO A REASONABLY WELL-TRAINED OFFICER. 4

II. THE CIRCUIT CONFLICT IS NOT RESOLVED BY THIS COURT'S DECISION IN *HOPE V. PELZER*. 10

III. THE CIRCUITS REQUIRE DIRECTION FROM THIS COURT AS TO THE APPROPRIATE TEST FOR DETERMINING OFFICIAL IMMUNITY. 12

Conclusion 20

TABLE OF CITATIONS

Cases Cited:

Pages

Anderson v. Creighton, 483 US 635 (1987) 6

Baker v. McCollan, 443 U.S. 137, 143 (1979) 15

Beck v. Ohio, 379 U.S. 89, 91, (1964) 19

Boyd v. United States, 116 U.S. 616, (1886) 6

Brewster v. Shasta County, 27 Fed. Appx. 908 (9th Cir. 2001) 8

Brown v. Gilmore, 278 F.3d 362 (4th Cir. 2002) . . . 8

Capone v. Marinelli, 868 F2d 102 (3rd Cir.1990) . . 8

Cerrone v. Fresenius, 246 F3d 194 (2nd Cir. 2001) 5, 7

Coons v. Casabella, 284 F3d 437 (7th Cir. 2002) . 6

Contents

Page

Gold v. City of Miami, 121 F3d 1442, 1445 (11th Cir. 1997) 16

Habiger v. City of Fargo, 80 F3d 289 (8th Cir. 1996) 6

Hope vs. Pelzer, _____U.S __ ____, 122 S.Ct. 2508, 1531L.Ed.2d 666 (2002) . . . 10, 11, 12

Howard v. United States, 456 U.S. 1010 (1982) 17

Hunter v. Bryant, 502 U.S. 224 (1991) 6, 18

Illinois v McArthur, 531 US 326 (2001) 16

Johnson v. Schneiderheinz, 102 F3d 340 (8th Cir. 1996 6

Jones v. Cannon, 174 F3d 1271, 1283 (11th Cir. 1999) 9, 15

Lee v. Sandberg, 136 F3d 94, 201 (2nd Cir. 1997). . 7

Knight v. Jackson, 300 F3d 1272 (2002) 9, 10

Malley v. Briggs, 475 US 335 (1986) . . 7, 8, 18

Manns v. Smith, 2000 U.S. App. LEXIS 368 8

Contents

Page

Mecham v. Taylor, 1997 US App LEXIS 16967 (10th Cir. 1997) 8

Moore v. Gwinnett County, 967 F2d 1495, 1497 (11th Cir. 1992) 6

Motes v. Myers, 810 F.2d 1055, 1059 (11th Cir. 1987) 14, 15

Myers v. Morris, 810 F2d 1437 (1st Cir. 1987). . . . 8

Payton v. New York, 445 U.S. 573, (1980) . . . 14, 17

Pratt v. Snohomish County, 1994 U.S. App. LEXIS 730 (9th Cir. 1993) 8

Rakas v. Illinois, 439 US 128, at 144, n. 12 (1978) 18

Robles v. Prince George's County, 302 F.3d 262 (4th Cir. 2002) 12

Rogers v. Powell, 120 F3d 446 (3rd Cir. 1997) 8

Saucier v. Katz, 533 U.S. 194 (2001) 19

Smithson v. Aldrich, 235 F3d 1058 (8th Cir. 2000) . . 6

Contents

Page

Teague v. Overton, 15 Fed. Appx. 597 (10th Cir. 2001) 8

Thornton v. City of Macon, 132 F.3d 1395, 1397 (11th Cir. 1998) 13, 15

United States v. Blasco, 702 F.2d 1315, 1325 (11th Cir. 1983) 17

United States v. Bulman, 667 F.2d 1374 (11th Cir. 1982), cert. denied sub nom . . . 17

United States v. Leon, 468 US 897 (1984) 18

United States v. Rodgers, 924 F.2d 219, 222 (11th Cir. 1991) 17

United States v. Santana, 427 US 321 (1976) . . . 16

United States v. Standridge, 810 F.2d 1034 (11th Cir. 1987) 17

United States v. United States District Court, 407 US 297 (1972) 5, 14

United States v. Young, 909 F.2d 442, 446 (11th Cir. 1990), cert. denied, 502 U.S. 825 (1991) 17

Contents

Page

Vance v. Nunnery, 137 F3d 270 (5th Cir. 1998) . . . 6

Willingham v. Loughnan, 261 F.3d 1178 (11th Cir. 2001) 9, 12

Wilson v. Attaway, 757 F.2d 1227, 1235 (11th Cir.1985) 14

Wilson v. Layne, 526 US 603 (1999) 5

Wolin v. Gondert, 192 F3d 616 (7th Cir. 1999) 6

Statues Cited:

28 U.S.C. §1254(1) 1

42 U.S.C. §1983 . . . . . 1, 3, 10, 11,12

APPENDIX

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED FEBRUARY 7, 2002 . . . . . 1a

APPENDIX B – DENIAL OF PETITION FOR REHEARING EN BANC FILED JULY 30, 2002 . . . . . 9a

Contents

Page

APPENDIX C - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, GAINESVILLE DIVISION DATED JULY 31, 2001 . . . . . 11a

PETITION FOR A WRIT OF CERTIORARI

COMES NOW, Petitioners Brenda and Robert Franklin and timely files this petition for review of a decision made by the Eleventh Circuit Court of Appeals.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals in case number 01-14536 is unreported and is reproduced in the Appendix filed herewith ("App.") at **1a**. The opinion of the U.S. District Court for the Northern District of Georgia is also unreported and is reproduced in the Appendix at **11a**.

STATEMENT OF JURISDICTION

The Eleventh Circuit Court of Appeals entered its judgment on February 7, 2002 and its denial of Petitioners' Petition for Rehearing and Petition for Rehearing En Banc on July 30, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

POSITIVE LAWS INVOLVED

U.S. Const. amend. IV: (full text)
U.S. Const. amend V: (full text)
U.S. Const. amend XIV: (full text)
42 U.S.C. §1983: (full text)

STATEMENT OF THE CASE

Brenda Franklin worked the night shift at a local manufacturing plant on the night of September 27, 1998, and the early morning of September 28. Her shift ended at 8:00 a.m. She went home and went to sleep. She was awakened by a call from the Habersham County Sheriff at about 1:00 p.m. The sheriff asked Mrs. Franklin if she knew the whereabouts of her husband Robert and her grandchild Haley. Neither were at the house. Mrs. Franklin did not know where they were. She told the sheriff that she would have Robert call when he got back to the house. About 20 minutes later, sheriff's Deputy Freddie Chapman knocked at Mrs. Franklin's door.

Mrs. Franklin answered the door in her night gown. She remained at the threshold of her front door to speak with Chapman. The front door opened inward, so Mrs. Franklin leaned out a little bit to hold open the screen door while she was talking with Chapman.

Chapman asked Mrs. Franklin where her husband and granddaughter were. Again, Mrs. Franklin stated that she did not know. Chapman concluded that Mrs. Franklin's grandchild was not present, but for reasons that are factually disputed decided to arrest Mrs. Franklin. Chapman claims that Mrs. Franklin became hostile and attempted to close her door. Mrs. Franklin denies that she acted with

any hostility until Chapman attempted to arrest her. It is unquestioned, however, that Chapman decided to arrest Mrs. Franklin when she told him that he could not come into her home and search it and attempted to shut the door.

Chapman forced his way into Mrs. Franklin's home and according to her testimony began throwing chairs and throwing her around the room. After the arrest, Mrs. Franklin was taken to the local hospital for medical treatment. She had bruising all over her torso and contusions on her head.

Chapman's visit to Mrs. Franklin's home was not in pursuit of any criminal investigation. Robert Franklin, Mrs. Franklin's husband, had taken their granddaughter with the permission of their daughter. Chapman's instructions were to determine whether the grandchild was at the home and, if she was there, to return her to her mother at the sheriff's office.

Mrs. Franklin and her husband filled suit in the United States District Court for the Northern District of Georgia, invoking the court's original federal jurisdiction under 42 U.S.C. § 1983. Chapman moved for summary judgement on the basis of qualified immunity. The District Court granted the motion for summary judgment, holding that Chapman's warrantless arrest and entry of Mrs. Franklin's home and arrest were protected by qualified immunity. That holding was affirmed by a panel of the Eleventh Circuit Court of Appeals, and reconsideration by the full court

was denied.

REASONS FOR GRANTING WRIT

I. A CONFLICT EXISTS AMONG THE COURTS OF APPEALS AS TO WHETHER THE TEST OF QUALIFIED IMMUNITY DEPENDS UPON THE SUBJECTIVE SPECULATIONS OF THE PARTICULAR OFFICER OR THE OBJECTIVE KNOWLEDGE IMPUTED TO A REASONABLY WELL-TRAINED OFFICER.

It was inconceivable to the founding fathers that the federal courts would protect officers who wrongfully entered the homes of citizens. As John Marshall responded in debate with George Mason during the Virginia Ratifying Convention:

> "[H]e says that the officers of the government will be screened from merited punishment by the federal judiciary. The federal sheriff, says he, will go into a poor man's house and beat him, or abuse his family, and the federal court will protect him. Does any gentleman believe this?" J. Elliott, ed., *The Debates in Several State Conventions on the Adoption of the Federal Constitution* 524 (2d ed., J.B. Lippencott, 1936).

Although the particular discussion related to state jurisdiction over federal issues, the sentiment is ironically prophetic. The Eleventh Circuit has certainly done here what no gentleman in Marshall's

time could believe.

The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home. *Wilson v. Layne*, 526 U.S. 603 (1999). Physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed. *United States v. United States District Court*, 407 U.S. 297 (1972). Nonetheless, the Eleventh Circuit has protected an officer who forcibly, and violently entered a woman's home because she refused to waive her Fourth Amendment Rights against unreasonable search and seizure. By immunizing Deputy Chapman from his total disregard for these principles, the Eleventh Circuit has called into question these fundamental precepts.

At the time Deputy Chapman assaulted Mrs. Franklin, there could have been little doubt that refusing to answer an officer's questions was not a crime, and more particularly that it did not amount to obstruction of an officer. *Cerrone v. Fresensius, infra.*, and *Thorton, infra. Thorton* is particularly relevant to the inquiry here because it accurately states the applicable principle of Georgia law that Mrs. Franklin's conduct did not amount to obstruction. Nor could anyone seriously contend that a refusal to waive Fourth Amendment rights would become a waiver of such rights. It would be impossible to square the Eleventh Circuit's conclusion that Applicant was arguably subject to arrest for refusing to talk to an officer or to allow an officer entry into her home with

the unbroken precedent of this Court since *Boyd v. United States*, 116 U.S. 616 (1886). Nonetheless, the Eleventh Circuit determined that an officer was free to act in ignorance of these basic constitutional principals without consequences.

The Eleventh Circuit's decision is based upon a standard that it has applied for some time in qualified immunity cases, known as the "arguable probable cause" standard. It is on precisely this question of whether an officer may be immune despite the existence of authority giving fair notice of the constitutional invalidity of his actions that the Circuits have developed diverging and contradictory doctrines. The Eleventh Circuit adopted the "arguable probable cause" standard in *Moore v. Gwinnett County*, 967 F2d 1495, 1497 (11th Cir. 1992), in response to this Court's decision in *Hunter v. Bryant*, 502 US 224, 227 (1991), citing *Anderson v. Creighton*, 483 US 635, 641 (1987), ("[E]ven law enforcement officials who "reasonably but mistakenly conclude that probable cause is present' are entitled to immunity."). The Fifth, *Vance v. Nunnery*, 137 F3d 270 (5th Cir. 1998), Seventh, *Wolin v. Gondert*, 192 F3d 616 (7th Cir. 1999), *Coons v. Casabella*, 284 F3d 437 (7th Cir. 2002); and Eighth Circuits, *Habiger v. City of Fargo*, 80 F3d 289 (8th Cir. 1996), *Johnson v. Schneiderheinz*, 102 F3d 340 (8th Cir. 1996), *Smithson v. Aldrich*, 235 F3d 1058 (8th Cir. 2000); have generally followed the Eleventh Circuit's arguable probable cause standard.

The very term arguable probable cause is

subject to two distinct meanings. The first would place the emphasis on those facts known to the officer. Thus, given the reasonably ascertainable facts, could the officer arguably have probable cause? In this meaning, the officer could be reasonably mistaken because he believed certain facts which were grounded in reality. Under this interpretation the reasonably well-trained officer remains part of the standard. The second meaning is to place the emphasis on what the officer arguably thought the facts to be. In this meaning the officer may assume facts that are not referable to reality. It is in this second context that the Eleventh Circuit has applied the "arguable probable cause" standard to many cases. Alarmingly, in this case, the Eleventh Circuit supplied the non-existent facts, stating that there was a "missing child" when there was none and stating that Mrs. Franklin had been uncooperative when Chapman had testified that she had answered all of his questions before attempting to close the door.

A careful review of the circuits that have followed the Eleventh Circuit demonstrates that the emphasis on what is arguable frequently leads to a subjective review of what the individual officer thought or could argue the relevant facts and law to be. This cannot be reconciled with *Malley v. Briggs*, 475 US 335 (1986), which requires that the objective standard of a well-trained officer be the proper standard. Likewise, the Second Circuit has applied the arguable probable cause standard. *Lee v. Sandberg*, 136 F3d 94, 201 (2nd Cir. 1997). *Cerrone v. Fresenius*, 246 F3d

194 (2nd Cir. 2001); *Lemmon v. Miller*, 66 F3d 416 (2nd Cir. 1995).

On the other hand, other Circuits have applied the objective standard of *Malley* without augmentation. In this regard the Third, *Capone v. Marinelli*, 868 F2d 102 (3rd Cir.1990), *Rogers v. Powell*, 120 F3d 446 (3rd Cir. 1997); Fourth, *Brown v. Gilmore*, 278 F.3d 362 (4th Cir. 2002); *Manns v. Smith*, 2000 U.S. App. LEXIS 368; Sixth, *Brown v. Gilmore*, 278 F3d 362 (2001), Ninth, *Brewster v. Shasta County*, 27 Fed. Appx. 908 (9th Cir. 2001), *Pratt v. Snohomish County*, 1994 U.S. App. LEXIS 730 (9th Cir. 1993), and Tenth Circuits, *Teague v. Overton*, 15 Fed. Appx. 597 (10th Cir. 2001), *Mecham v. Taylor*, 1997 US App LEXIS 16967 (10th Cir. 1997); have all, more or less, utilized a "reasonably well-trained officer" standard without the additional analysis of what is "arguable probable cause." In these circuits, one is hard pressed to find a decision which approximates the unlikely result in this one.

The First Circuit follows a hybrid line of reasoning between those following the Eleventh and the Third, Fourth, Sixth, Ninth and Tenth.. There the "arguable" probable cause is defined in a way that incorporates the well-trained officer standard of *Malley*. Thus to "be arguable ... means that it is possible for 'officers of reasonable competence' to fairly disagree over whether probable cause exists... The presence of probable cause would not be 'arguable' if no reasonably competent officer would have found probable cause." *Myers v. Morris*, 810 F2d 1437 (1st

Cir. 1987).

Although phrased in terms of an objective test, the "arguable probable cause" standard followed by the Eleventh Circuit and others manifestly rests upon the subjective impressions of the officer whose conduct is at issue. As amply demonstrated by the instant case, this test is wholly consumed by the issue of what the officer perceived and believed to be the facts and has nothing to do with what objective knowledge would be imputed to a reasonably well-trained officer. Indeed, by focusing on the officer's testimony that Mrs. Franklin was hostile, the Eleventh Circuit goes so far as to rule, sub silentio, that the "arguable probable cause" standard requires that the officer's version of facts be accepted as true, even where disputed. In this regard, it must be remembered that Mrs. Franklin denied that she cursed at the officer or was hostile to him in any way other than refusing him entry into her home.

The arguable probable cause standard permits unconstitutional conduct by a police officer to go completely unchecked so long as the officer is able to articulate some basis, however unfounded in statutory or case law, for concluding that his actions were authorized.[1] As applied, the standard eviscerates any

---

1

See Eleventh Circuit decision, *Jones v. Cannon*, 174 F3d 1271 (11th Cir. 1999); *Willingham v Laughnan*, 261 F3d 1178 (11th Cir. 2001); *Knight v. Jackson*, 300 F3d 1272 (2002). The officer asked Plaintiff to step outside. When he complied, the Eleventh Circuit concluded that he was "arguably" in a public place and because the officer arguably

remedial relief that might be afforded by 42 U.S.C. §1983 for violations of the Fourth and Fifth Amendments. Ironically, only persons who are completely innocent of any offense will be denied the protections of the Constitution. Those persons who do commit criminal acts and are charged with those offenses will have the protection of motions to suppress which will exclude illegally obtained evidence from their trials. Thus, only those people who never get a trial, because they never committed any offense that was triable, will be subject to unreasonable searches and seizures without any means of redress.

II. THE CIRCUIT CONFLICT IS NOT RESOLVED BY THIS COURT'S DECISION IN *HOPE V. PELZER*.

This court's recent decision in *Hope vs. Pelzer*, _____U.S _____,122S.Ct. 2508, 1531L.Ed.2d 666 (2002), reaffirmed prior holdings of the Court that qualified immunity was not available to the offending official that has "fair notice" of the unconstitutionality of his actions. At first glance, this ruling would appear to dispose of the conflict among the Circuits as to the appropriate inquiry in determining whether sufficient indicia of probable cause existed to entitle an officer to

---

believed him to be guilty of a misdemeanor assault for threatening his neighbor, he was subject to arrest. Taking *Knight* together with this case leads to the conclusion that in the Eleventh Circuit one is "arguably" in a public place by virtue of answering one's front door.

qualified immunity. Unfortunately, this is not the case. As the Eleventh Circuit refusal to reconsider its ruling in this case in light of *Hope* illustrates, the problem is not in what should constitute the standard by which an officer's conduct should be measured but rather how that standard should be applied. Thus, courts applying the "arguable probable cause" standard are inexorably tempted to misuse the standard that is set by "fair notice" and reduce it to what can be argued by the most ignorant. An officer need not be concerned that previous jurisprudence or positive law may render him liable for illegal activity. Instead, the arguable probable cause standard has been imposed as an additional requirement to the determination, under *Hope* and previous cases. That is, a claimant under 42 U.S.C. §1983 must satisfy two conditions in order to overcome official immunity. First, the claimant will have shown that existing law gave the officer "fair notice" that his conduct was unconstitutional. Even after that burden is overcome, however, the successful claimant must go further and show that it was not at least "arguable" for that particular officer to conclude that he had probable cause to make a warrantless arrest or to conduct a warrantless search.

This Court's jurisprudence makes it amply clear that the decision on official immunity should be an objective inquiry. By focusing on the conduct of the particular officer, however, the "arguable probable cause" standard as applied amounts to an end run around the requirement of an objective analysis based on the standard of a well-trained or reasonably

competent officer. It permits an officer to benefit from the protections of qualified immunity despite the existence of "fair notice" that his actions were unconstitutional. So as long as he testifies to a version of the facts that creates an appearance that he believed his actions were authorized, the officer is immune. This remains true even where his conduct offends the most basic principles of the Constitution. The protections of 42 U.S.C. §1983, and indeed the Bill of Rights itself, are limited to protecting the public against only those officers so stupid as to admit to malice.

III. THE CIRCUITS REQUIRE DIRECTION FROM THIS COURT AS TO THE APPROPRIATE TEST FOR DETERMINING OFFICIAL IMMUNITY.

Assuming that this court's ruling in *Hope* has settled the question of whether courts evaluating official conduct must find substantial factual identity with previously prohibited conduct or grant official immunity to the officer, [2] a further declaration of the

---

[2] There is some question whether the court's decision has even accomplished this goal. *See, Robles v. Prince George's County*, 302 F.3d 262 (4th Cir. 2002). See also, *Willingham v. Loughnan*, 261 F.3d 1178 (11th Cir. 2001, rev'd by this court, *Willingham v. Loughnan*, 2002 U.S. LEXIS 5395.

appropriate type of inquiry into official immunity is required. While, unfortunately, the majority of Circuits following the "arguable probable cause" standard have erected it as an additional barrier to redress for unlawful actions, the other Circuits have properly limited the analysis to the objective standard derived from clearly established law. This court should intervene to establish the appropriate inquiry so as to prevent inconsistent decisions from Circuit to Circuit.

Nor does the "arguable probable cause" standard result in consistent decisions even within the same Circuit. (Compare *Thornton*, infra., and this case). The ideal of the Constitution is that decisions under it will not depend on which judges are hearing the appeal. By focusing as it does on the particularized evidence of the perceptions and mental processes of the officer involved, the "arguable probable cause" standard guarantees a subjective inquiry into the mental process of the offending officer instead of the objective testing of his conduct against the well-trained officer standard.

Engrafting an additional, subjective inquiry onto the objective analysis mandated by this Court's rulings leads to results so anomalous as to require the Court's intervention. It will inevitably result in decisions immunizing officers from liability when their conduct violated legal standards of which they not only had fair notice, but which could not reasonably be questioned.

This is precisely the result that the Eleventh Circuit has fashioned in this case.

In fact, taking the existing precedent of this Court alone, there is not a single articulated fact which justified Chapman to remain on Appellants' property or which allowed him to arrest her after Petitioner Franklin attempted to shut her door. Fourth Amendment protections of the personal abode and preference for judicial arbitration of probable cause are, and were, "well-established."

> Our analysis in this case may therefore properly commence with rules that have been well established in Fourth Amendment litigation involving tangible items. As the Court reiterated just a few years ago, the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297. And we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort. (emphasis added).
>
> FN24. ... When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent."

Payton v. New York, 445 U.S. 573, 585, 100 S.Ct. 1371, 1379,100 S.Ct. 1371, 1380 (1980).

Likewise, there was ample precedent demonstrating to any officer in Chapman's situation that there was no probable cause to arrest Brenda Franklin from her home. See *Baker v. McCollan*, 443 U.S. 137, 143, (1979); *Wilson v. Attaway*, 757 F.2d 1227, 1235 (11th Cir.1985); *Motes v. Myers*, 810 F.2d 1055, 1059 (11th Cir. 1987).

The Eleventh Circuit found Chapman developed "arguable probable cause" to arrest Petitioner for obstruction of an officer when she attempted to close her door on him. Curiously, this same bootstrapping argument had been rejected by the Eleventh Circuit in a case with striking similarities. *Thornton v. City of Macon*, 132 F.3d 1395,1397 (11th Cir. 1998).

Likewise, in this case, Defendant Chapman could not reasonably believe that he could arrest Plaintiff Brenda Franklin for attempting to shut her front door after she had told him the child was not at her residence. With these principle so well established, the fair warning standard dictates the outcome. Certainly, no qualified immunity would be available to Chapman given the clear ruling of *Thorton*. Yet, the Eleventh Circuit applied the arguable probable cause standard in such a way as to parse the facts and ignore the clear principles.

In other cases, "arguable probable cause" has been defined as that which a "reasona ble officer" "**could** have believed" was probable cause. *Jones v. Cannon*, 174 F3d 1271, 1283 (11th Cir. 1999); citing

Gold v. City of Miami, 121 F3d 1442, 1445 (11th Cir. 1997).

Further illustration of Eleventh Circuit's wayward journey was its misapplication of the principles of *United States v. Santana*, 427 US 321 (1976) to the facts of this case under the guise of "arguable probable cause." In *Santana*, undercover police officers had just purchased drugs from a suspect who identified her source as "Mom" and referred to the defendant as residing at a certain residence. Officers relayed this information to another officer who drove by the residence and spotted the defendant, an older female, standing openly in a doorway with a brown paper bag. They stopped and when she attempted to retreat back into her residence, she was arrested. It is hard to imagine a more different situation than the one sub judice.

Here, Appellant Brenda Franklin was not "standing" in her doorway but was summoned to her threshold by Appellee Chapman. Further, there was absolutely no reasonable suspicion that Appellant Brenda Chapman was guilty of any crime. Finally, in *Santana*, the defendant was arrested because of probable cause that she had committed a crime independent of her attempt to retreat into her residence. In this case, Appellant Brenda Franklin was arrested **because** she attempted to retreat into her residence.

As noted most recently by this Court in *Illinois*

v McArthur, 531 US 326 (2001), the "central requirement" of the Fourth Amendm ent is one of reasonableness. Id. Thus, the arguable probable cause must touch down on some factor that can reasonably lead to the conclusion that a warrant is unnecessary, either a reasonable belief that a crime has been committed or a reasonable belief that a search might be conducted in lieu of a warrant because some other exigent circumstance exist. See *Payton v. New York*, 445 U.S. 573, (1980). See, e.g., *United States v. Bulman*, 667 F.2d 1374 (11th Cir. 1982), cert. denied sub nom, *Howard v. United States*, 456 U.S. 1010, (1982); *United States v. Standridge*, 810 F.2d 1034 (11th Cir. 1987).

The test for whether or not exigent circumstances exist is whether the facts would lead a reasonable, experienced officer to believe that evidence might be destroyed or removed before a warrant could be secured. *United States v. Rodgers*, 924 F.2d 219, 222 (11th Cir.1991). Recognized situations in which exigent circumstances exist include: "danger of flight or escape; danger of harm to police officers or the general public; risk of loss, destruction, removal, or concealment of evidence; and hot pursuit of a fleeing suspect." *United States v. Blasco*, 702 F.2d 1315, 1325 (11th Cir.1983). This court has held that the need to invoke the exigent circumstances exception to the warrant requirement is "particularly compelling in narcotics cases" because narcotics can be so easily and quickly destroyed. *United States v. Young*, 909 F.2d 442, 446 (11th Cir.1990), cert. denied, 502 U.S.

825 (1991).

There is not a single exception to the warrant requirement that is applicable to this case. The conclusion reached by the Eleventh Circuit that Franklin was in a public place because she answered her door is illogical and a dangerous precedent. However, the conclusion that she was obstructing the officer by refusing his warrantless entry into her residence is so violative of the Fourth Amendment as to destroy its meaning. Indeed, this Court has noted, one of the main characteristics of privacy that is protected by the Fourth Amendment is the right to "exclude others." *Rakas v. Illinois*, 439 US 128, at 144, n. 12 (1978). Often, the attempt to exclude others is a sign that one's expected level of privacy is significant. Id. Under the circumstances of this case, Franklin's attempt to shut her door was the exercise of a fundamental constitutional right.

Thus, *Malley* is at war with the Eleventh Circuit's finding of "arguable probable cause" in this case. The majority decision in *Malley* is predicated on the assumption that an officer seeking good faith immunity is to be held to the same standard as an officer arguing against exclusion of that evidence in a criminal case. (referring to *United States v. Leon*, 468 US 897 (1984); see also *Hunter v. Bryant*, 502 U.S. 224 (1991) at 228, "Probable cause existed if 'at the moment the arrest was made . . . . the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were

sufficient to warrant a prudent man in believing'" a crime had been committed (quoting *Beck v. Ohio*, 379 U.S. 89, 91, 13 L. Ed. 2d 142 (1964); and *Saucier v. Katz*, 533 U.S. 194 (2001) where the excessive force analysis of the Fourth Amendment requires an inquiry into the objective facts known to the officer at the time that the decision is made). It is clear that the Eleventh Circuit is now departing sharply from this precedent.

CONCLUSION

At first glance, it would be easy to underestimate the harm that the "arguable probable cause" doctrine has done to the Fourth Amendment. Although the perceived need for exigent circumstance exceptions have eroded protections traditionally afforded under the Fourth Amendment, this Eleventh Circuit decision now presents an exception of circularity whereby an officer is granted immunity for the warrantless search of a home based on the occupants refusal to allow the search. Along this circular path, the arrest and confinement of the person refusing the search would also be the subject of immunity because the act of refusing the search is deemed an act of hostility toward the investigating officer and his duty to investigate crime. As noted, the bizarre result is that the illegal search of a home might well cause the evidence in a criminal prosecution to be suppressed. Thus, a potential criminal has a remedy for such a search but an innocent person does not.

Respectfully submitted, this day of October, 2002.

John M. Brown
Attorney for Petitioners
GA Bar #088138
2321 Central Avenue
Augusta, GA 30904
(706) 731-9925
(706) 731-9559

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED FEBRUARY 7, 2002

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Decided FEB 0 7 2002

No. 01-14536
Non-Argument Calendar

D. C. Docket No. 00-00164-CV-WCO-2

BRENDA FRANKLIN, ROBERT FRANKLIN
Plaintiffs-Appellants,
versus
FREDDIE CHAPMAN,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

(February 7, 2002)

Before ANDERSON, Chief Judge, BLACK and

MARCUS, Circuit Judges.

PER CURIAM:

Brenda and Robert Franklin, the plaintiffs in this § 1983 action, sued Freddie Chapman for the unlawful arrest of Brenda Franklin, the unlawful entry into the Franklin home to do so, and the use of excessive force in executing that arrest. The plaintiffs also brought several state law causes of action. Defendant Chapman moved for summary judgment on all claims. The district court granted that motion because it found Chapman entitled to qualified immunity. The plaintiffs appeal that ruling. For the reasons set forth below, we affirm.

We review an appeal of the entry of summary judgment de novo. Tackitt v. Prudential Ins. Co. of America, 758 F.2d 1572 (11th Cir. 1985).

The defense of qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Jordan v. Doe, 38 F.3d 1559, 1565 (11th Cir. 1994). Consequently, so long as a government official (1) acts within the scope of his discretionary authority and (2) does not violate clearly established law, the doctrine of qualified immunity protects him from prosecution. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Our first question, then, is whether Officer

Chapman acted within his discretionary authority. Chapman must prove that he acted within his discretion with "objective circumstances which would compel the conclusion that his actions were undertaken (1) pursuant to the performance of his duties and (2) within the scope of his authority." Rich v. Dollar, 841 F.2d 1558, 1563-64 (11th Cir. 1988).

Chapman has provided this Court with such "objective circumstances" to show that his actions were undertaken pursuant to the performance of his duties. Chapman is a police officer, and as such he investigates possible crimes. On the day in question, Chapman was ordered to investigate a claim of interference with the custody of the defendant's step-grandson. That investigation led him to the Franklin residence. From that evidence it is clear that his actions in questioning Ms. Franklin were undertaken pursuant to the performance of his duties.

We must also determine whether his actions were undertaken "within the scope of his authority." Questioning possible witnesses and/or suspects is common in law enforcement. We agree with the district court that doing so is within Chapman's scope of authority. Therefore the first prong of the immunity test is satisfied.

We now turn to the second prong of the immunity test, in which Franklin must show that "when the defendant acted, the law established the

contours of a right so clearly that a reasonable official would have understood his acts were unlawful." Post v. City of Fort Lauderdale, 7 F.3d 1552, 1557 (11th Cir. 1993). Franklin argues that Chapman unlawfully arrested her, that he impermissibly entered her house, and that he used excessive force. We will address each claim in turn.

With regards to the unlawful arrest charge, Chapman is entitled to immunity "if a reasonable officer could have believed [the suspect's] arrest to be lawful, in light of clearly established law and the information the arresting officers possessed". Montoute v. Carr, 114 F.3d 181, 184 (11th Cir. 1997). In other words, he merely had to have arguable probable cause to arrest Franklin.

A person who "knowingly and willfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties" is guilty of misdemeanor obstruction of justice under Georgia law. See Ga. Code Ann. § 16-10-24. Franklin admits that when Chapman came to her door, she knew that he was there because of the investigation of the missing child. Although we recognize that Georgia case law regarding obstruction of justice is very fact specific, Chapman merely had to have arguable probable cause to arrest her. Under the circumstances here, including Franklin's hostility to the officer and lack of cooperation with respect to a knowing investigation, we agree with the district court that there was

arguable probable cause.

We also agree with the district court that Chapman is entitled to summary judgment on Franklin's claim that he violated her Fourth Amendment rights by entering her house. The warrantless entry into a person's home is prohibited by the Fourth Amendment absent consent or exigent circumstances, and is presumptively unreasonable. See e.g., Welsh v. Wisconsin, 466 U.S. 740, 741 (1984). Chapman argues, however, that he could arrest Franklin without a warrant because he witnessed her violating the law, and that he entered the house in "hot pursuit" after initiating the arrest in a public place.

As noted above, Chapman had arguable probable cause to arrest Franklin. Pursuant to Georgia law, when Franklin committed obstruction of justice in Chapman's presence, he could arrest her without a warrant. See Ga. Code Ann. § 17-4-20(a) ("An arrest for a crime may be made ... without a warrant if the offense is committed in such officer's presence"). When he attempted to arrest Franklin, she was standing on the threshold of the open door between her front porch and her residence, with the screen door ajar and leaning out so she could speak with the officer. This is a public place. United States v. Santana, 427 U.S. 38, 42 (1976). The arrest of a person in a public place can be accomplished absent a warrant. United States v. Watson, 423 U.S. 411 (1976). The permissibility of that

arrest cannot be quashed by the defendant's action of running into the home after the officer has initiated the arrest. Santana, 427 U.S. at 43 ("A suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under Watson, by the expedient of escaping into a private place.").

However, Franklin argues that this case involves a mere misdemeanor, and is more akin to the Supreme Court's decision in Welsh v. Wisconsin, 466 U.S. 740, 741 (1984), which "casts serious doubt on the question of whether a warrantless home arrest for a misdemeanor will ever be deemed reasonable." Greiner v. City of Champlin, 27 F.3d 1346, 1353 (8th Cir. 1994). It is noteworthy, however, that Welsh involved a drunken driving violation, whereas this case involves obstructing the investigation of a missing child.

Although the Supreme Court stated that "it is difficult to conceive of a warrant-less home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor", this is not a situation in which the misdemeanor obstruction charge could *obviously* be considered "minor". Welsh, 466 U.S. at 753.

Thus, we must agree with the district court that because the case law is unclear as to whether his actions were proper, Officer Chapman is entitled to qualified immunity on the unlawful entry claim.

Lastly, we agree with the district court that Chapman is entitled to summary judgment on Franklin's claim that he used excessive force. "[Q]ualified immunity applies unless application of the standard would inevitably lead every reasonable officer in [Chapman's] position to conclude that force was unlawful." Post v. City of Fort Lauderdale, 7 F.3d 1552, 1559 (11th Cir. 1993). We consider Chapman's actions in light of the facts and the circumstances surrounding him at the time he arrested Franklin, including whether the suspect was fleeing or resisting arrest. Graham v. Conner, 490 U.S. 386, 397 (1989); Post, 7 F.3d at 1559.

Here, after Chapman physically caught Franklin, who was both fleeing from him and resisting arrest; he twisted her hands, threw her up against a love seat, and banged her head against a wall. Although she suffered bruises on her arms and torso and a knot on her head, we cannot disagree with the district court's conclusion that her injuries were minimal. Although Franklin argues that this display of force was unnecessary, in light of her flight and resistance it is certainly not clear that every officer in his position would have believed the force to be unlawful.[1] The facts of this case indicate a struggle in

---

[1] Franklin argues that this case is similar to Thornton v. City of Macon, 132 F.3d 1395 (11th Cir. 1998). In that case, officers attempted to resolve a purely civil dispute; Thornton asked the officers to leave, and they refused. Finally, without there being any violation of the law whatsoever, the officers charged into Thornton's apartment, forcibly restrained him, and dragged

which Franklin was attempting to flee, and under the circumstances Chapman had to physically restrain her from doing so. We note that Chapman did not know if the child whose disappearance he was investigating was within the house, and that the injuries Franklin sustained from the force that he used were minimal in nature. Because the evidence here would not nevitably lead every reasonable officer in Chapman's position to conclude that the force exerted on Franklin was unlawful, we affirm the district court's entry of summary judgment.

Because Officer Chapman is entitled to immunity, the district court was correct in dismissing the federal claims against Officer Chapman, and in refusing to exercise jurisdiction over the state law causes of action.

AFFIRMED.

---

him to the police car. Id. at 1398. In that situation, any reasonable officer would have recognized that the force was excessive. That is unlike the present case, where Chapman appeared at Franklin's home as part of an investigation. During the time he was at the house, Franklin not only refused to answer questions (a misdemeanor), but she also fled into the house.

APPENDIX B - DENIAL OF PETITION FOR REHEARING EN BANC
FILED JULY 30, 2002

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

No. 01-14536-PF

BRENDA FRANKLIN, ROBERT FRANKLIN,
Plaintiffs-Appellants,

versus

FREDDIE CHAPMAN,
Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia----------

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, _____F.2d _____).

Before: ANDERSON, Chief Judge, BLACK and MARCUS, Circuit Judges.

PER CURIAM;

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

CHIEF JUDGE

APPENDIX C - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, GAINESVILLE DIVISION DATED JULY 31, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA GAINESVILLE DIVISION

BRENDA FRANKLIN and	:	
ROBERT FRANKLIN,	:	CIVIL NO.
Plaintiffs,	:	2:00-CV-164-WCO
	:	
v.	:	
	:	
FREDDIE CHAPMAN,	:	
Defendant.	:	

ORDER

This case is presently before the court for consideration of defendant's motion for summary judgment [15-1].

I. Facts

The events leading up to the incident in question are disputed. Defendant Freddie Chapman, a deputy for the Habersham County Sheriff's Department, claims that on September 28, 1998, a Ms. Bobbie Lee Burns filed a police report with Sheriff

Bonnie James that her four year -old daughter, Haley Burns, was missing and that she believed that her father, Mr. Robert Franklin, a plaintiff in this matter, had taken the child without permission. In support of this contention, Deputy Chapman submits an alleged incident report of Sheriff James. See Def.'s Mot. Summ. J., Ex. A. & Statement Undisputed Facts ¶¶ 1-3. Plaintiffs challenge the alleged incident report on the grounds that it is hearsay and double-hearsay. The court notes that the incident report is not sworn to or certified in any manner and, thus, is inadmissible and shall not be considered by the court at this time.

Plaintiffs claim that "[t]o the best information and belief of Plaintiffs, Bobbie Burns knew Plaintiff Robert Franklin, her father, had taken the child to a medical doctor. There is no competent evidence that her daughter was missing. Ms. Bobbie Burns has not testified nor has there been any testimonial evidence filed showing Ms. Bobbie Burn's [sic] statements in this regard." However, plaintiffs do not cite any evidence supporting their claims.

Deputy Chapman claims that after hearing Ms. Burns' allegations, Sheriff James directed him to go to the Franklin residence and see if Mr. Franklin or Ms. Burns' daughter were there. Plaintiffs deny that allegation and claim that "Sheriff James called the residence and was told by Mrs. Franklin that Robert was not there. Thereafter, he sent Deputy Freddie Chapman to Mrs. Franklin's residence." Plaintiffs rely

on Mrs. Franklin's deposition at pages 25-26 to support this contention.

Although the parties dispute the events leading up to the incident in question, it is undisputed that Deputy Chapman went to the Franklin home looking for Haley Burns as directed by the Sheriff. As for the incident itself, plaintiffs support their version of the facts with Mrs. Franklin's deposition, and Deputy Chapman supports his version of the facts with his deposition and police report attached to his deposition as Exhibit 5. It is well-settled that a court evaluating a summary judgment motion must view the evidence in the light most favorable to the non-movant. See, e.g.,Samples v. City of Atlanta, 846 F.2d 1328, 1330 (11th Cir. 1988); Tippens v. Celotex Corp., 805 F.2d 949, 953 (11th Cir. 1986), reh'g denied, 815 F.2d 66 (11th Cir. 1987). Thus, for purposes of summary judgment only the court hereby accepts plaintiffs' rendition of the facts.

Mrs. Franklin claims that she was sleeping, as she works nights and sleeps during the day, when Sheriff James telephoned the house. Approximately 20 minutes after the call from the Sheriff, she heard a knock on the door, did not see anyone through her bedroom window, heard another knock, and then answered the front door. She opened the door fully and opened the screen door partially because she was wearing her nightgown. Deputy Chapman was fully uniformed. Assuming he was there in relation to the

call from the Sheriff and without allowing Deputy Chapman to speak, Mrs.' Franklin stated " [h] e' s not here[.]" Id. p. 29. Deputy Chapman replied "[w]ho's not here?" Mrs. Franklin claims she replied that Robert Franklin was not there. She explained to Deputy Chapman that the Sheriff had called previously and, thus, she assumed he was therein regards to that matter. Id. at 31. She claims that Deputy Chapman then asked her to step out on the porch. Id. She admits that she refused because she was only wearing her nightclothes. She claims he then said, "Step out on the porch, I am handcuffing you and I am taking you to jail." Id. Mrs. Franklin again refused saying "Why are you taking me to jail? I haven't done anything. I am in the bed asleep. All I know is what I've just told you that Ronnie told me." Id. She admits Deputy Chapman repeatedly told her to step out on the porch.

At this point, Mrs. Franklin claims that one of her daughters, Lakeeta--who also lived at the Franklin residence, drove up to the residence. Mrs. Franklin claims that she called for her to come up on the porch because the deputy said he was going to take her away. When Lakeeta came up on the porch, Mrs. Franklin allegedly let the screen door go because she was going back into the house to get some clothes. Mrs. Franklin alleges that Deputy Chapman then entered the house behind her and rushed at her. She describes the situation as follows:

> Lakeeta came on in the house behind us and he told her to get out and

she said, "I live here." He repeatedly kept telling Lakeeta to get out, and he said, "Put your hands behind you, I am handcuffing you and taking you to jail."

By this time I am starting to hyperventilate because I have a heart condition, anyway, with my valves, and I couldn't breathe. I was smothering. So, he put his hand -- I went to the table and he threw three of my dining room chairs and he broke the rungs off of them. I was over on that side of the table and he was on this side and he put his hand to his gun and unbuckled it.

Then he fastened it back and he said, "I'm going to spray you," and he started to get, I guess, his spray, and Lakeeta said, "Mama, he's going to hurt you," and I stood up from the table and put my hands out and he grabbed them and twisted them. He twisted the handcuffs like that on it with my arm twisted, and he threw me up against the love seat and hit my ribs and cracked one of my ribs on the wooden part of the love seat, banged my head against the wall twice, and then he picked me up and he threw me over on the sofa and my gown was up over my -- my panties was showing and everything and I am begging him, "Please loosen these

handcuffs because they're hurting so bad," and he just -- he wouldn't do nothing.

Thereafter, Mrs. Franklin was taken by ambulance to the hospital, examined, diagnosed with minor bruising and anxiety, released, and then arrested for obstruction of justice.[1]

On August 16, 1999, Mr. and Mrs. Franklin

1

The court notes that Officer Chapman's rendition of the facts differs greatly from Mrs. Franklin's. He claims that from the moment Mrs. Franklin opened the front door she launched into a barrage of unintelligible remarks littered with obscenities. Without being able to explain the purpose of his visit, he claims that Mrs. Franklin slammed the door shut. He knocked on the door again, and Mrs. Franklin opened it. As she stood in the doorway to her home, Deputy Chapman claims she returned to cursing at him as he tried to explain why he was there. Bewildered by her unprovoked belligerence and uncertain as to whether the missing child was within the residence, Deputy Chapman claims he then instructed Mrs. Franklin to step out onto the porch. She refused. He repeated his order several more times, and she again refused and instead retreated into her home. Deputy Chapman claims that because of Mrs. Franklin's unusual reaction and because he needed to further investigate whether the child might be hidden in their home, Deputy Chapman chose to pursue her and arrest her for obstruction of justice. Mrs. Franklin continued to flee from him and resisted arrest. Once he had Mrs. Franklin contained he immediately radioed for an ambulance. After being treated and released from the hospital, Mrs. Franklin was taken to the Habersham County Sheriff's Department where she was processed.

brought suit in Habersham County Superior Court asserting 5 causes of action against Deputy Chapman: (1) assault and battery; (2) intentional infliction of emotional distress; (3) invasion of privacy and trespass; (4) false arrest; and (5) loss of consortium. On August 31, 2000, plaintiffs amended their complaint to include claims of unlawful arrest, unlawful and unwarranted invasion of privacy, and excessive force pursuant to the Fourth Amendment of the United States Constitution. It appears that plaintiffs again amended their complaint on September 5, 2000, to clarify that they were entitled to relief under 42 U.S.C. §§ 1983 and 1988. Deputy Chapman removed the case to this court on September 13, 2000. He has moved for summary judgment claiming he is entitled to judgment as a matter of law based on qualified immunity and on the merits.

II. Summary Judgment Standard

Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Only those claims for which there is no need for a factual determination and for which there is a clear legal basis are properly disposed of through summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

It is well-settled that a court evaluating a summary judgment motion must view the evidence in the light most favorable to the non-movant. See, e.g., Samples v. City of Atlanta, 846 F.2d 1328, 1330 (11th Cir. 1988); Tippens v. Celotex Corp., 805 F.2d 949, 953 (11th Cir. 1986), reh'g denied, 815 F.2d 66 (11th Cir. 1987). To survive a motion for summary judgment, the non-moving party need only present evidence from which the trier of fact might return a verdict in his favor. Samples, 846 F.2d at 1330. However, Rule 56, "[b]y its very terms, . . . provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original). The materiality of facts is governed by the relevant substantive law in the case. Id. at 248. A dispute is genuine if the evidence is such that the factual issues "may reasonably be resolved in favor of either party." Id. at 250.

Consideration of a summary judgment motion does not lessen the burden on the non-moving party: the non-moving party still bears the burden of coming forth with sufficient evidence on each element that must be proved. See Earley v. Champion Int'l Corp., 907 F.2d 1077, 1080 (11th Cir. 1990) (emphasis in original); Celotex, 477 U.S. at 322-23. In Earley, the Eleventh Circuit further emphasized:

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. . . .
>
> . Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case . . . . In such circumstances, there can be no genuine issue of material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial . . . . If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

Id. (emphasis in original) citations omitted).

III. Federal Claims

A. Qualified Immunity

"That qualified immunity protects government actors is the usual rule; only in exceptional cases will government actors have no shield against claims made against them in their individual capacities." Lassiter v. Alabama A & M Univ., Bd. of Trustees, 28 F.3d 1146,

1149 (11th Cir. 1994) (en banc) (citations and emphasis omitted). A public official is entitled to qualified immunity from a section 1983 damages action if his actions did not violate clearly established law. See Thornton v. City of Macon, 132 F.3d 1395, 1399 (11th Cir. 1998). "Plaintiffs bear the burden of showing that the federal 'rights' allegedly violated were 'clearly established.' " Lassiter, 28 F.3d at 1150 n.3 (citations omitted).

> For the law to be clearly established to the point that qualified immunity does not apply, the law must have earlier been developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the defendant's place, that 'what he is doing' violates federal law. Qualified immunity is a doctrine that focuses on the actual, on the specific, on the details of concrete cases.
>
> . . .
>
> 'General propositions have little to do with the concept of qualified immunity.' 'If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant.'

Id. at 1150.

When determining whether a government official is entitled to qualified immunity, the court must engage in a two-step analysis. See, e.g., Linz v.

Winburn, 51 F.3d 1540, 1545 (11th Cir. 1995). "First, the defendant must show that []he acted within the scope of [his] discretionary authority. Once the defendant has so shown, the plaintiff must show that the defendant violated the plaintiff[s'] clearly established statutory or constitutional rights." Id.

A government official proves that he acted within the purview of his discretionary authority by showing that his actions were "(1) undertaken pursuant to the performance of his duties, and (2) within the scope of his authority." Harbert Int'l Inc. v. James, 157 F.3d 1271 (11th Cir. 1998). In examining Deputy Chapman's actions, "[t]he inquiry is not whether it was within the defendant's authority to commit the allegedly illegal act. Framed that way, the inquiry is no more than an 'untenable' tautology. Instead, a court must ask whether the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of an official's discretionary duties. The scope of immunity 'should be determined by the relation of the [injury] complained of to the duties entrusted to the officer.'" Harbert at 1282 (citations omitted). The court finds that Deputy Chapman's actions, i.e., acting as a deputy of the Habersham County Sheriff's Department and investigating the missing child claim regarding Haley Burns pursuant to the direction of the Sheriff, were undertaken pursuant to the performance of his duties and were within the scope of his authority. Thus, the first step of the analysis is satisfied. The

court shall separately examine whether the plaintiffs have shown that Deputy Chapman violated their clearly established statutory or constitutional rights under each individual claim.

B. Unlawful Arrest

In the Fourth Amendment-unlawful arrest context of qualified immunity, the question is whether the law enforcement officer had arguable probable cause, as opposed to the higher standard of actual probable cause. See Jones v. Canon, 174 F.3d 1271, 1283 n.3 (11th Cir. 1999). "'[T]he inquiry is not whether probable cause actually existed, but instead whether an officer reasonably could have believed that probable cause existed, in light of the information the officer possessed." Montoute v. Carr, 114 F.3d 181, 184 (11th Cir. 1997). Therefore, the question before the court is whether Deputy Chapman possessed arguable probable cause to arrest Mrs. Franklin for obstruction of justice. If Deputy Chapman did possess arguable probable cause then he could have reasonably believed that effecting the arrest did not violate Mrs. Franklin's clearly established statutory or constitutional rights.

Section 16-10-24 of the Official Code of Georgia provides as follows:

> (a) Except as otherwise provided in subsection (b) of this Code section, a

> person who knowingly and willfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties is guilty of a misdemeanor.
>
> (b) Whoever knowingly and willfully resists, obstructs, or opposes any law enforcement officer, prison guard, correctional officer, probation supervisor, parole supervisor, or conservation ranger in the lawful discharge of his official duties by offering or doing violence to the person of such officer or legally authorized person is guilty of a felony and shall, upon conviction thereof, be punished by imprisonment for not less than one nor more than five years.

Although the parties do not specify, the court assumes that Mrs. Franklin was arrested for misdemeanor obstruction.

The pre-existing law in Georgia regarding obstruction arrests demonstrates that the propriety of such an arrest is a highly fact intensive inquiry, where the result in cases turns on the slightest change in circumstances. See Sprinkles v. Georgia, 488 S.E.2d 492, 494, 227 Ga. App. 112,113 (Ga. App. 1997) (an officer responded to a call that a white male was attempting to enter a black truck near room 219 at a

motel; the officer saw a man fitting the description run from a black truck into room 215; the officer went to room 215 and spoke with 2 women - one of whom was Sprinkles; he advised them that he was investigating a report that someone matching the description of the man he saw run into their room had been attempting to enter a black truck in the parking lot; Sprinkles told the officer that the truck was hers and that she wanted to leave; he told her she could not leave until he confirmed the truck was hers, met with the man who appeared to have run to their bathroom, and spoke with the person who called the police; as they waited for the arrival of the person who called the police, Sprinkles took her purse and an overnight bag, pushed a second officer out of the doorway, and began walking down the sidewalk; one of the officers told her that if she did not come back so he could complete his investigation she would be arrested for obstruction; she stated that she was leaving and kept walking; the officer advised her that she was under arrest and grabbed her arm in order to handcuff her; Sprinkles began yelling at and fighting the officers; they forced her to the ground, handcuffed her, and placed her in the back of the police car; the Georgia Court of Appeals held that the arrest was lawful; the court stated the following: "Flight after a lawful command to halt constitutes obstruction of an officer. And a person may commit obstruction where he knowingly andwilfully hinders an officer, in investigating an offense committed by another. The officers had grounds to arrest Sprinkles for obstruction when she pushed an

officer aside and left after being told the officer needed to talk to her as part of the investigation and being ordered to wait."); Carter v. Georgia, 474 S.E.2d 228, 222 Ga. App. 397 (Ga. App. 1996) (an officer was dispatched to a house to investigate a possible theft; the defendant approached the officer while he was speaking with the individuals who reported the theft and began speaking loudly at the officer and using obscenities; the defendant followed the officer making disruptive comments, talking loudly, and using obscenities; the Court of Appeals held there was sufficient evidence to support the misdemeanor obstruction charge); Okongwu v. Georgia, 467 S.E.2d 368, 220 Ga. App. 59 (Ga. App. 1995) (undisputed proof that defendant bolted after a law enforcement officer warned him that Sheriff's deputies were approaching the premises to execute a search warrant and evidence that defendant was observed by an officer handing something to another person just before the police raid constituted sufficient evidence to support obstruction conviction); Reed v. Georgia, 422 S.E.2d 15, 205 Ga. App. 209 (Ga. App. 1992) (an officer observed the defendant driving erratically, apparently drunk, and then park the car at his home; the defendant walked away from the officer into his trailer, did not respond at all to the officer's orders, and forced the officer to get an arrest warrant; Court of Appeals found no error in the trial court's denial of defendant's motion for directed verdict on the obstruction charge); Colev v. State, 344 S.E.2d 490, 178 Ga. App. 668 (1986) (an officer arrived at the

scene of a domestic dispute; the defendant refused to obey the officer's command to move away from his truck; when the defendant began to walk away toward the house, the officer ordered him to stop and the defendant refused; the officer then grabbed the defendant and arrested him; the Court of Appeals reversed the trial court's denial of directed verdict of acquittal). In Hudson v. State, 135 Ga. App. 739, 218 S. E. 2d 905 (1975), the Court of Appeals noted that the obstruction statute had been purposely drafted broadly to cover actions that might not be otherwise unlawful but which obstructed or hindered law enforcement officers in carrying out their duties.
Mrs. Franklin admits that she knew Deputy Chapman was there pursuant to Sheriff James' earlier call regarding Haley Burns and Mr. Franklin. She admits that she repeatedly refused the deputy's requests to step out on the porch and that she retreated into the house despite said requests. Thus, the court concludes that Deputy Chapman had arguable probable cause, that is he reasonably could have believed that probable cause existed, to conclude that Mrs. Franklin had actual knowledge that Deputy Chapman was investigating the missing child matter and she wilfully hindered that investigation thereby committing misdemeanor obstruction of justice.

Plaintiffs have not demonstrated that the law in this area had been previously "developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in the

defendant's place, that 'what he is doing' violates federal law." Lassiter v. Alabama A & M Univ., Bd. of Trustees, 28 F.3d 1146, 1149 (11th Cir. 1994) (en banc) (quoting Anderson v. Creighton, 483 U.S. 635 (1987)). "If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." Post v. City of Fort Lauderdale, 7 F. 3d 1552, 1557 (11th Cir. 1993, modified, 14 F.3d 583 (11th Cir. 1994). The court finds that the pre-existing law did not stake out a bright line and did not compel the conclusion that Deputy Chapman's arrest of Mrs. Franklin, even when accepting the facts as alleged by the plaintiffs, was "so obviously wrong, . . that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing[.]" , 28 F.3d at 1149. Accordingly, Deputy Chapman is entitled to qualified immunity for Mrs. Franklin's Fourth Amendment claim of unlawful arrest.

C. Unlawful Entry

Plaintiffs claim that Deputy Chapman's entry into their home constituted a violation of their Fourth Amendment right to be free from unlawful and unwarranted intrusion upon their property. Deputy Chapman claims that he was permitted to enter the plaintiffs' home to arrest Mrs. Franklin without an arrest warrant because (1) Mrs. Franklin committed the offense of obstruction in his presence, see O.C.G.A. § 17-4-20 (a) ("An arrest for a crime may be made by a

law enforcement officer . . . without a warrant if the offense is committed in such officer's presence . . . ."), and (2) the lawful arrest for that offense had been set into motion in a public place, the threshold of her doorway, see United States v. Santana, 427 U.S. 38 (1976).

Even where probable cause exists, the warrantless intrusion of a person's home is prohibited by the Fourth Amendment absent consent or exigent circumstances and is presumptively unreasonable. See, e.g.,Welsh v. Wisconsin, 466 U.S. 740, 741 (1984); Steagald v. United States, 451 U.S. 204, 216 (1981). There is no question that consent was absent in the present case. Deputy Chapman claims that exigent circumstances existed because he entered plaintiffs' home in "hot pursuit" of Mrs. Franklin as she retreated into her home after committing obstruction in his presence.

The Supreme Court's decision in Welsh v. Wisconsin, 466 U.S. 740, 741 (1984), "casts serious doubt on the question of whether a warrantless home arrest for a misdemeanor will ever be deemed reasonable." Greiner v. City of Champlin, 27 F.3d 1346, 1353 (8th Cir. 1994). "In Welsh, the police entered a house without a warrant to arrest Welsh for drunken driving, which, on first offense, was a noncriminal violation, punishable by a maximum fine of $200. The only exigent circumstance was that Welsh's blood alcohol level would dissipate during the

delay required to obtain a warrant." Id. (citations omitted). The Supreme Court held that the gravity of the underlying offense for which an arrest is being made is an important factor to be considered when determining whether any exigency exists. The Court concluded that the warrantless home arrest of Welsh violated the Fourth Amendment.

The Supreme Court noted that

> Hesitation in finding exigent circumstances, especially when warrantless arrests in the home are issue, is particularly appropriate when the underlying offense for which there is probable cause to arrest is relatively minor. Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. When the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.

Welsh, 466 U.S. at 750. The Court went on to state"that it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor." Id. at 753.

Nevertheless, the Court declined to flatly say that there could be no warrantless home arrest for a misdemeanor. The Court explained as follows: "Because we conclude that, in the circumstances presented by this case, there were no exigent circumstances sufficient to justify a warrantless home entry, we have no occasion to consider whether the Fourth Amendment may impose an absolute ban on warrantless home arrests for certain minor offenses." Id. at 749 n. 11. Courts have differed in their application of Welsh to warrantless home misdemeanor arrests. See Greiner v. City of Champlin, 27 F.3d 1346, 1353-54 (8th Cir. 1994) (collecting cases) (concluding that defendant officers were entitled to qualified immunity for the subject warrantless home misdemeanor arrests).

Deputy Chapman argues that United States v. Santana, 427 U.S. 38 (1976), supports his claim that his actions were constitutional and, at the least, creates uncertainty as to the legality of his actions thereby entitling him to qualified immunity. In Santana, officers had information that Santana had in her possession marked money used to purchase

heroin by an undercover agent. The officers went to her house where she was standing in the doorway holding a brown paper bag. "She was standing directly in the doorway one step forward would have put her outside, one step backward would have put her in the vestibule of her residence." Id. at 40 n.l. The officers approached shouting "police," and displayingtheir identification. Santana retreated into the vestibule of her house where they caught and arrested her.

The Supreme Court found that the police initiated her arrest when she was in a public place, the not in an area where she had any expectation of privacy. 'What a person knowingly exposes to the public, even in his own house or office, is not a subject of the Fourth Amendment protection.' She was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house." Id. at 42 (citations omitted) . The Court concluded "that a suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place." Id. at 43. The Court agreed that the officers had the right to pursue Santana under the "hot pursuit" doctrine. Agreeing that although "hot pursuit" means some sort of chase, the Court added that "it need not be an extended hue and cry ' in and about (the) public streets.' The fact that the pursuit here ended almost as soon as it began did not render it any the less a 'hot pursuit' sufficient to justify the warrantless entry into Santana's house.

Once Santana saw the police, there was likewise a realistic expectation that any delay would result in destruction of evidence." Id. 42.

Deputy Chapman claims that his actions were not unconstitutional under Santana. Mrs. Franklin admits that she was standing in her open doorway, although she was partially behind the screen door. See Brenda Franklin Depot, p. 36 ("I was standing in the door."). She also admits she knew that she was going to be arrested for obstruction if she refused to step out onto the porch. Despite the deputy's orders, she retreated into her home.

Deputy Chapman claims that he was "uncertain as to whether the missing child was within the residence and perplexed by [Mrs.] Franklin's obstinance in light of the fact that her step-granddaughter was missing," and, therefore, he "pursued [Mrs.] Franklin into her home in order to ffectuate a lawful arrest that had been set in motion in a public place." Def.'s Br. Support of Mot. Summ. J., p. 13 [15-1]. Deputy Chapman points out that O.C.G.A. § 16-5-45(b) makes it a crime for anyone to knowingly or recklessly take a child away from the individual vested with lawful custody absent permission or legal authority to do so.

The court notes that Santana is distinguishable from the present case in that Santana involved a felony drug charge where the destruction of evidence was a

real exigency requiring hot pursuit whereas the instant case involves a misdemeanor charge without any concern for destruction of evidence. Nevertheless, the instant case also involved the investigation of a missing child, a serious concern. Thus, when considering that (1) the situation involved the report of a missing child, (2) the situation occurred while Mrs.
Franklin stood in the threshold of her home and (3) Mrs. Franklin knew of the situation and yet persistently refused to comply with Deputy Chapman's requests, it may not have been obvious to all reasonable officers in Deputy Chapman's place that what he was doing violated federal law.

Without determining the merits of whether the warrantless entry into the Franklin's home to effectuate Mrs. Franklin's arrest was actually constitutional, the court cannot conclude in light of Welsh, Santana, and the particular facts of the case that Deputy Chapman's actions were "so obviously wrong . . . that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing [.]" Lassiter, F.3d 1146, 1149. The case law had not staked out a bright line as to the propriety of his actions. Accordingly, Deputy Chapman is entitled to qualified immunity from plaintiffs' unlawful entry claim.

D. Excessive Force

Deputy Chapman claims that he is entitled to

qualified immunity from Mrs. Franklin's Fourth Amendment claim of excessive force as well.

> Whether a specific use of force is excessive turns on factors such as the severity of the crime, whether the suspect poses an immediate threat, and whether the suspect is resisting or fleeing. See Graham v. Connor, 490 U.S. 386, 394, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989). Use of force must be judged on a case-by-case basis "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Id. Because this standard establishes no bright line, qualified immunity applies unless application of the standard would inevitably lead every reasonable officer in [the defendant-officer's] position to conclude the force was unlawful.

Post v. City of Fort Lauderdale, 7 F.3d 1552, 1559 (11th Cir. 1993). In considering the reasonableness of the force used, the court is to look to the "need for force, the amount of force used, and the injury inflicted." Jones v. City of Dothan, 121 F.3d 1456, 1460 (11th Cir. 1997) . Even if the use of force is "unnecessary," qualified immunity may still be appropriate if "the actual force used and the injury inflicted were both minor in nature." Id.

Plaintiffs claim that Thornton v. City of Macon, 132 F.3d 1395 (11th Cir. 1998) establishes that Deputy Chapman's force was excessive. In Thornton, the officers in question were dispatched to Thornton's residence seeking to resolve a civil dispute and effectuate the exchange of keys, to be given to Thornton, for a mattress, to be taken from Thornton. However, because the matter was civil in nature the officers did not have the legal authority to force the exchange. Once Thornton asked the officers to leave, the officers could not remain on his property. Nevertheless, the officers remained and persisted in trying to get Thornton to come out on the porch. Finally, the officers "told him that if he opened the screen door, they would give him his car keys. As Thornton opened the door to get the keys, the officers charged into the apartment. One of the officers grabbed Thornton's arms, and another grabbed Thornton around the neck. The officers threw Thornton to the floor, cuffed his hands behind his back, picked him up by his arms, dragged him outside
and shoved him into a police car." Id. at 1398. The Eleventh Circuit concluded that "[u]nder the circumstances, the officers were not justified in using any force, and a reasonable officer thus would have recognized that the force used was excessive." Id. at 1400.

The instant case is distinguishable from Thornton. Although the arrest was for misdemeanor obstruction, Mrs. Franklin was obstructing an

investigation into a criminal allegation, that of interference with custody, see O.C.G.A. § 16-5-45(b), unlike Thornton, where the officers lacked authority because they were seeking to resolve a civil dispute. As previously noted, Deputy Chapman's actions as a deputy of the Habersham County Sheriff's Department investigating the missing child claim regarding Haley Burns in response to the complaint reported by her mother, Bobbie Burns, were undertaken pursuant to the performance of his duties as a deputy and were within the scope of his authority. See Singleton v. State, 390 S.E.2d 648, 649, 194 Ga. App. 423, 423 (Ga. App. 1990) ("The officers were in the lawful discharge of their duties when they responded to the disorderly person call."). The court has also found that Deputy Chapman had arguable probable cause to arrest Mrs. Franklin and that effectuating the arrest inside her home would not be obviously illegal to a reasonable officer. Moreover, as the whereabouts and safety of the child were unknown, the seriousness of the situation was increased.

Mrs. Franklin alleges that Deputy Chapman twisted her hands while putting handcuffs on her, threw her against the love seat which hit her ribs[2],

---

[2] Mrs. Franklin claims that one of her ribs was cracked. However, the medical records from her examination the night of the arrest submitted by the plaintiffs do not reflect any such injury. Deputy Chapman also submitted the medical record of Mrs. Franklin's examination completed by her physician the day after the arrest which likewise did not reflect any such injury. Two weeks after the arrest, Mrs. Franklin went to her physician complaining of pain in the lower ribcage. The doctor concluded that it was a "probable muscle strain/contusion or contused rib."An x-ray wasdeemed unnecessary, and Advil was suggested for relief.

banged her head against the wall twice, picked her up and threw her on the sofa, and then refused to loosen the handcuffs. The medical reports submitted by the plaintiffs show that Mrs. Franklin suffered "very superficial scrapes" on her arms and bruising on the left arm. See Pl.s' Br. Resp. Def.'s Mot. Summa J., Ex.s A & B. The day following her arrest, Mrs. Franklin was seen by her physician who found that there was "no obvious bruising and no lacerations" but there was "tenderness to palpation in the forearms generally[.]"

Additionally, the medical records from the day of the arrest do not support Mrs. Franklin's version of the events. The assessment form reflects that Mrs. Franklin reported that "the law came and started handcuffing her and then she got short of breath" and that the "policeman hurt her [left] arm." Mrs. Franklin did not complain of having her head banged or of being thrown around by Deputy Chapman, nor did she suffer any injuries that would support such allegations. Thus, the court finds that those self-serving allegations are not supported by sufficient evidence for summary judgment purposes.

The court finds that the amount of force used as well as the injuries sustained were minimal under the Eleventh Circuit's interpretation of minimal force.

Nolin v. Isbell, 207 F.3d 1253, 1257 (11th Cir. 2000) (plaintiff claimed that defendant officer "grabbed him from behind by the shoulder and wrist, threw him against a van three or four feet away, kneed him in the back and pushed his, head into the side of the van, searched his groin area in an uncomfortable manner, and handcuffed him[;]" the plaintiff suffered bruising to the forehead, chest, and wrists which disappeared quickly; the plaintiff did not seek medical treatment; the Eleventh Circuit found that the force and injuries alleged were de minimis and did not support a claim of excessive force). The Eleventh Circuit has made clear that "the application of de minimis force, without more, will not support a claim for excessive force in violation of the Fourth Amendment." Id.

Deputy Chapman was investigating the report of a missing child and was uncertain as to whether the child might be inside the home. Mrs. Franklin refused to comply with Deputy Chapman's requests, indeed defied them, and retreated into her home seemingly to avoid arrest. Thus, when considering the circumstances and de minimis nature of the force used and injuries sustained, the court cannot find that every reasonable officer in Deputy Chapman's position would inevitably conclude that the force was unlawful. Accordingly, qualified immunity applies and Deputy Chapman is entitled to summary judgment.

IV. State Law Claims

Plaintiffs have also brought state law claims of

assault and battery, false arrest, intentional infliction of emotional distress, invasion of privacy and trespass, and loss of consortium. As all federal claims have been disposed of, the court declines to exercise supplemental jurisdiction over the remaining state claims and hereby **REMANDS** those claims back to the Superior Court of Habersham County. See 28 U.S.C. § 1367(c) (3) ("The-district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if . . . (3) the district court has dismissed all claims over which it has original jurisdiction") The clerk is hereby **DIRECTED** to send a certified copy of this order to the clerk of the Habersham County Superior Court.

V. Conclusion

In summary, the court has ruled as follows:

A. Defendant's motion for summary judgment [15-1 1 is **GRANTED in part** and **DENIED in part**. It is **GRANTED** as to plaintiffs' federal claims and **DENIED** as to plaintiffs' state claims.

B. Plaintiffs' state claims are **REMANDED** to the Superior Court of Habersham County, and the clerk is **DIRECTED** to send a certified copy of this order to the clerk of the Superior Court of Habersham County.

IT IS SO ORDERED this 31st day of July, 2001.

WILLIAM C. O'KELLEY
Senior United States District Judge

No. 02-0656

NOV 29 2002

OFFICE OF THE CLERK

In The

Supreme Court of the United States

BRENDA FRANKLIN AND ROBERT FRANKLIN,

Petitioners,

v.

FREDDIE CHAPMAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TERRY E. WILLIAMS
Counsel of Record
G. KEVIN MORRIS
TERRY E. WILLIAMS & ASSOCIATES
Attorneys for Respondent Freddie Chapman

205 Culver Street
Lawrenceville, Georgia 30045
678.442.9444 Telephone
678.442.8566 Telecopier

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the United States Supreme Court, the undersigned counsel for the Respondent certifies that the following is a full and complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of this case and appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held company, and other indefinable legal entities related to a party:

- Association County Commissioners of Georgia-
  Interlocal Risk Management Agency
  Self-Insurance Pool
  Insurer for Respondent
- John Michael Brown
  Counsel for Petitioner
- Brenda Franklin
  Petitioner
- Robert Franklin
  Petitioner
- G. Kevin Morris
  Counsel for Respondent
- Hon. William C. O'Kelley
  Judge, United States District Court for the
  Northern District of Georgia
- Terry E. Williams
  Counsel for Respondent
- Terry E. Williams & Associates
  Counsel for Respondent

TABLE OF CONTENTS

	Page
CORPORATE DISCLOSURE STATEMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
COUNTER STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
I. THERE IS NO CONFLICT AMONG COURTS INVOLVING QUALIFIED IMMUNITY AND THE REASONABLY WELL-TRAINED OFFICER ANALYSIS	3
II. PETITIONER'S RELIANCE UPON *THORNTON* IS MISPLACED AND OFFERS NO GUIDANCE TO THE INSTANT MATTER	6
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) 4

Eubanks v. Gerwin, 40 F.3d 1157 (11th Cir. 1994) 5

Lee v. Ferraro, 284 F.3d 1188 (11th Cir. 2002) 4

Montoute v. Carr, 114 F.3d 181 (11th Cir. 1997) 4

Scarbrough v. Myles, 245 F.3d 1299 (11th Cir. 2001) 4

Thornton v. City of Macon, 132 F.3d 1395 (11th Cir. 1998) 6, 7, 8

Von Stein v. Brescher, 904 F.2d 572 (11th Cir. 1990) 4

COUNTER STATEMENT OF THE CASE

On September 28, 1998, Ms. Bobbie Lee Burns entered the Habersham County Sheriff's Department and reported her daughter missing. She alleged that four (4) year-old Haley Burns had been taken from the child's babysitter by Mr. Robert Franklin. Ms. Burns emphatically added that she never gave Robert Franklin, the child's grandfather, permission to take the child.

Given Ms. Burns' apparent distress, Sheriff Ronnie James summarized Ms. Burns' allegations to Deputy Freddie Chapman and asked him to call upon the Franklin residence to investigate the whereabouts of missing Haley Burns and Robert Franklin. As instructed, Deputy Chapman traveled to the Franklin home, and upon arrival, he approached the front door and knocked. After several minutes without an answer, Deputy Chapman knocked again, and Ms. Brenda Franklin, the missing child's stepgrandmother, opened the door.

Incredibly, Ms. Franklin launched into a barrage of unintelligible remarks littered with obscenities. Without having had the opportunity to explain the purpose of his visit, Ms. Franklin slammed the door shut on the deputy. Once again, Deputy Chapman knocked on the door, and Ms. Franklin opened it. Thereupon, Ms. Franklin, standing in the open doorway to her home, returned to cussing the officer as he repeatedly attempted to explain why he was there.

Bewildered by Ms. Franklin's unprovoked belligerence and still uncertain as to whether the missing child was within the residence, Deputy Chapman instructed Ms. Franklin to step out onto the porch. Ms. Franklin refused. Deputy Chapman repeated his order several more times to

Ms. Franklin – "step out on the porch." Then, fully aware that Deputy Chapman was going to arrest her if she did not comply with his instruction, Ms. Franklin turned her back on the deputy and retreated into her home.

At this point, because of Ms. Franklin's suspicious response to the news that her step-granddaughter was missing and because Deputy Chapman needed to further investigate whether the child might be hidden in the Franklin home, Deputy Chapman chose to pursue Ms. Franklin and arrest her for obstruction of justice. Clearly aware of Deputy Chapman's intent to place her into custody, Ms. Franklin chose to flee further inside her home from the deputy and resist his arrest. Consequently, Ms. Franklin began to hyperventilate, and Deputy Chapman immediately radioed for an ambulance. After being treated and released from the Habersham County Medical Center, Ms. Franklin was taken to the Habersham County Sheriff's Department and processed.

REASONS FOR DENYING THE WRIT

The sole question presented by the Petition is whether the Eleventh Circuit's arguable probable cause analysis impermissibly shifts the objective component of qualified immunity analysis to a subjective inquiry. Petitioners argue that the Eleventh Circuit's arguable probable cause analysis of qualified immunity effectively "requires the officer's version of the facts to be accepted as true, even when disputed." Pet. at 9. The Petition further suggests that the application of arguable probable cause analysis has led to "diverging and contradictory doctrines" among the circuits. Pet. at 6. However, the Eleventh Circuit's

"arguable probable cause" analysis does not lead to the result suggested by Petitioners; the Eleventh Circuit's "arguable probable cause" analysis in the this case, as well as all those cited by the Petitioners, remains an objective inquiry.

The District Court and Eleventh Circuit both used an objective analysis and their conclusions were proper in all respects. Moreover, the Petitioners have failed to demonstrate any real conflict among the circuits. Thus, Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

I. THERE IS NO CONFLICT AMONG COURTS INVOLVING QUALIFIED IMMUNITY AND THE REASONABLY WELL-TRAINED OFFICER ANALYSIS

This Petition should be denied because there is no conflict among the circuits involving qualified immunity and the reasonably well-trained officer analysis. Petitioners argue that the Eleventh Circuit is in conflict with other jurisdictions because the "arguable probable cause" analysis improperly relies upon the subjective impressions of an officer, whereas other circuits rely on those "facts that [are] grounded in reality." Pet. at 7. Petitioners further argue that the Eleventh Circuit's "arguable probable cause" should be rejected by this Court because it "requires that the officer's version of the facts to be accepted as true," even where disputed. *Id.*

Petitioners' argument, however, is flawed because there is absolutely no evidence that Eleventh Circuit precedent employs anything other than an objective analysis. For example, in a seminal "arguable probable

cause" case for the Eleventh Circuit, the court held that, "[a]ctual probable cause is not necessary for an arrest to be objectively reasonable. Indeed, 'it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and . . . in such cases those officials . . . should not be held personally liable.'" *Von Stein v. Brescher*, 904 F.2d 572, 579 (11th Cir. 1990) (citing *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987)). The court added that, "[t]he standard is an objective one, and therefore does not include an inquiry into the officers' subjective intent or beliefs." *Id.* (citation omitted).

This same standard pervades more recent decisions as well. For instance, in *Montoute v. Carr*, 114 F.3d 181, 184 (11th Cir. 1997), the Eleventh Circuit held that "an officer need not have actual probable cause but only 'arguable probable cause,' i.e., the facts and circumstances must be such that the officer reasonably could have believed that probable cause existed." And, most recently in *Lee v. Ferraro*, the Eleventh Circuit reiterated the standard to be used in Fourth Amendment false arrest cases, noting that "[a]rguable probable cause exists 'where reasonable officers in the same circumstances and possessing the same knowledge as the Defendant[ ] could have believed that probable cause existed to arrest.'" *Lee v. Ferraro,* 284 F.3d 1188 (11th Cir. 2002) (quoting *Scarbrough v. Myles*, 245 F.3d 1299, 1302 (11th Cir. 2001)).

Importantly, despite Petitioners' interpretation of the precedent, the listed cases demonstrate that there is no divergence among the circuits. That is to say, the Eleventh Circuit, like those circuits relied upon in Petitioners' brief, use an objective standard to evaluate qualified immunity as applied to Fourth Amendment false arrest claims.

Indeed, Petitioner attempts to obscure this fact by focusing on the "arguable probable cause" language, but such attempt bears no affect on the analysis. Pet. at 8 (arguing that numerous other jurisdictions have utilized the "'reasonably well-trained officer' standard without the additional analysis of what is 'arguable probable cause'"). This is because "[a]rguable probable cause exists 'where reasonable officers in the same circumstances and possessing the same knowledge as the Defendant[ ] could have believed that probable cause existed to arrest.'" *Id.* In other words, Petitioners attempt to muddle the issue fails because the "arguable probable cause" analysis is tantamount to determining whether reasonable officers, in the same or similar circumstances, could have believed that probable cause existed for the arrest. *Eubanks v. Gerwin*, 40 F.3d 1157, 1160 (11th Cir. 1994) (holding that the standard for arguable probable cause is "whether a reasonable officer . . . *could* have reasonably believed that probable cause existed. . . . ").

As applied by the Eleventh Circuit and District Court to the case *sub judice*, there is no evidence that either court deviated from an objective analysis. For instance, Judge O'Kelley held that, in light of the facts admitted by the Petitioner, "Deputy Chapman had arguable probable cause" to arrest Ms. Franklin. Pet. at 26a. Notably, this conclusion was not based upon the version of facts presented by the Respondent, but rather was based upon facts that the Petitioner admitted. "Mrs. Franklin admits that she knew Deputy Chapman was there pursuant to Sheriff James' earlier call regarding Haley Burns and Mr. Franklin. She admits that she repeatedly refused the deputy's requests to step out on the porch and that she

retreated into the house despite said requests." *Id.* Accordingly, the District Court held "that Deputy Chapman had arguable probable cause, that is he reasonably could have believed that probable cause existed, to conclude that Mrs. Franklin had actual knowledge that Deputy Chapman was investigating the missing child matter and she willfully hindered that investigation thereby committing misdemeanor obstruction of justice." Pet. at 26a.

Likewise, the Eleventh Circuit noted that "Chapman is entitled to qualified immunity 'if a reasonable officer could have believed [the suspect's] arrest to be lawful, in light of the clearly established law and the information the arresting officer possessed.'" Pet. at 4a (citation omitted). And, relying on this analysis, it concluded that the circumstances established at least arguable probable cause for the Petitioner's arrest. Pet. at 4a-5a.

Therefore, because the arguable probable cause standard is not in conflict with other circuits and because the District Court and Eleventh Circuit properly applied same, this case does not present a compelling reason to grant certiorari.

II. PETITIONER'S RELIANCE UPON *THORNTON* IS MISPLACED AND OFFERS NO GUIDANCE TO THE INSTANT MATTER

Sections II and III of Petitioners' brief seemingly argue that the Eleventh Circuit erred because Respondent had 'fair notice' that his conduct was unlawful by virtue of its holding in *Thornton v. City of Macon*, 132 F.3d 1395, 1397-98 (11th Cir. 1998). In that case, a police officer was summoned to an apartment complex to assist a woman in returning a set of keys to her former roommate in

exchange for her mattress that was still inside the apartment. *Id.* Agreeing to assist the woman, the officer approached the apartment with the keys. *Id.* However, as he got close to the door, Thornton, the woman's former roommate, told the officer he had done nothing wrong and ordered the officer to leave. *Id.* The officer then decided to call for back-up and continued his efforts to coax Mr. Thornton outside. *Id.* Thornton eventually agreed to open the door to receive the keys, but when he did, "the officers charged into the apartment" and placed him under arrest for obstruction of a law enforcement officer. *Id.* Thornton subsequently filed suit against the officers.

Citing this Court's recent holding in *Hope v. Pelzer*, ___ U.S. ___, 122 S.Ct. 2508, 1531 L.Ed.2d 666 (2002), Petitioners suggest that the *Thornton* decision provided 'fair notice' to Deputy Chapman that his actions were unlawful. Notably though, Petitioners' reliance on this case is misplaced because the facts of *Thornton* involved a civil dispute, not a criminal investigation. The court, in rejecting the defendant officers' qualified immunity defense, held that they acted outside of their official duties and lawful authority by attempting to "forcibly . . . resolve a *civil* dispute." *Id.* (emphasis added). In other words, although the officers were authorized to "mediate and defuse a contentious situation," they clearly did not have the legal authority to force a resolution to the dispute between former roommates, and consequently, absent the authority to forcibly resolve a civil dispute over keys, the defendants were precluded from the shield of qualified immunity. *Id.* Simply stated, the officers in *Thornton* could not meet the first prong of the qualified immunity analysis; were the officers acting within the scope of their discretionary authority?

In this case, it is undisputed that the Respondent was acting within his discretionary authority by investigating a reported criminal act: "Questioning possible witnesses and/or suspects is common in law enforcement." Pet. at 3a. Accordingly, because the facts of *Thornton* are distinguishable and because the court concluded that the officers were not acting within their authority by forcibly resolving a civil dispute, the Petitioners' reliance thereon is inapposite. That is to say, because *Thornton* involved a completely different set of circumstances, it is nonsensical for Petitioners to suggest that qualified immunity should be denied when Deputy Chapman was clearly acting within his discretionary authority. And, more importantly, because the facts and circumstances of *Thornton* are not analogous to those herein, it is equally obvious that such case does not demonstrate that the law was clearly established.

Consequently, because neither the facts nor circumstances of *Thornton* are in any way similar to those of the instant matter, thereby eviscerating Petitioners' 'fair notice' argument, there is no compelling reason for this Court to grant the petition.

CONCLUSION

For the within and foregoing reasons, the Respondent prays that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

TERRY E. WILLIAMS
Counsel of Record
G. KEVIN MORRIS
TERRY E. WILLIAMS & ASSOCIATES
Attorneys for Respondent
Freddie Chapman

205 Culver Street
Lawrenceville, Georgia 30045
678.442.9444 *Telephone*
678.442.8566 *Telecopier*